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No. 99-1679

IN THE

Supreme Court of the United States

COUNTY OF SAN DIEGO; RUDOLPH TAMAYO; EDWARD BAKER; GABRIEL RODRIGUEZ,

Petitioners,

v.

RICHARD McALINDIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ADDITIONAL STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 12102 provides:

As used in this chapter:

* * *

(2) Disability

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

A. The ADA claims.

Plaintiff/Appellant/Respondent Richard McAlindin (hereinafter "McAlindin" or "Respondent") began working for Defendant/Appellee/Petitioner the County of San Diego (hereinafter "County" or "Petitioner") in 1983 as a Computer Systems Analyst in the Housing and Community Development Department. From 1984 to 1989, he received "above-standard" evaluations and was considered an

excellent employee. In 1989, McAlindin reported what he believed to be waste and illegal activity by software vendors. McAlindin's supervisors, including Defendant Edward Baker, rejected his reports and took actions against McAlindin which McAlindin considered retaliatory, causing him anxiety and stress. This anxiety and stress resulted in a disability leave in June 1989 and a 15% permanent disability rating through California workers' compensation system.

Following McAlindin's return to work, retaliatory acts continued, and in May 1992 McAlindin took an eighteen month disability leave (until November 1993). He was diagnosed with anxiety disorder, panic disorder, and somatoform disorder. These disorders substantially limited McAlindin's ability to interact with others both at work (where at times he was essentially "paralyzed" and made outbursts) and elsewhere (staying home and staying away from public places such as shopping centers, restaurants, etc.). They also substantially limited his ability to sleep at night. McAlindin takes medications for the disorders which alleviate, but do not eliminate the disorders.[1] The medications have also caused him to sleep at work (resulting in discipline) and have caused impotence.

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1. In a somewhat misleading passage, the Petition for writ of certiorari (hereinafter "Petition") states "the court (of appeals) noted that McAlindin's anxiety disorders were controlled by medication, thereby negating McAlindin's ability to assert those disorders as a disability." (Citations and notes omitted.) (Pet. at 5.) While the Petition does go on to correctly note that the Court of Appeals did find that McAlindin's declaration created a genuine issue of material fact whether he had a disability "even with medication and other treatment", the Court of Appeals did not find that the medications "controlled" the disorders, or that McAlindin's ability to assert that the disorders were a disability was "negated".

Beginning in May 1993, (after McAlindin had been on disability leave for about one year), McAlindin through counsel in a series of letters which were supported by a psychiatrist's report, requested that the County transfer him to another department under authority of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12100, *et seq.* The psychiatrist's report (ultimately concurred with by three other medical professionals,[2] specifically recommended that McAlindin should not return to his previous position because it would exacerbate his condition and impede his recovery. When McAlindin ultimately returned to work in November 1993, he was (and continued to be) denied a transfer to a different department which would relieve the negative associations and anxiety.

Denied a transfer after he returned to work, McAlindin suffered more adverse employment actions which he considered retaliatory and otherwise unjustified, and which continued to cause him anxiety. McAlindin continued to have the anxiety disorder and to require medication.

B. The Proceedings Below.

The District Court granted summary judgment on the ADA claims, finding that McAlindin's anxiety disorder did not "substantially limit a major life activity." The District Court did not address the issue of reasonable accommodation. (App. 37, 52.)

In a modified opinion, a majority of the Court of Appeals reversed the grant of summary judgment on the ADA claims,[3]

2. App. 10, n.5.

3. McAlindin's suit also alleged retaliation claims under the ADA and state law. Some retaliation claims were dismissed by the District Court's grant of summary judgment which was affirmed on appeal, and some claims were dismissed without prejudice so appellate jurisdiction could be achieved.

finding that McAlindin raised a triable issue regarding whether his mental impairments substantially limited the major life activities of interacting with others, sexual relations and sleeping. (App. 15-17.) The majority opinion also found that due to a "lack of evidence offered by the County and the relative unburdensome nature of the requested accommodation" there was a triable issue regarding whether the requested transfer was a reasonable accommodation. (App. 21-22.)

REASONS FOR DENYING THE WRIT

The writ should be denied because the Ninth Circuit's decision does not conflict with other court of appeals decisions and the Ninth Circuit fully considered and correctly decided the issues in the case presented to it.

I.

THERE IS NO CONFLICT WITH DECISIONS OF THE FIFTH CIRCUIT, SINCE THE NINTH CIRCUIT'S DECISION EXPRESSLY ESTABLISHES THE PROPER NEXUS BETWEEN THE ESTABLISHMENT OF A DISABILITY AND THE REQUIREMENT FOR AN EMPLOYER TO ACCOMMODATE A DISABILITY, (THAT "THE TWO INQUIRIES . . . ONLY INTERSECT TO THE EXTENT THAT MCALINDIN'S DISABILITY MANIFESTS ITSELF IN THE WORKPLACE")

A. The Petition Misleadingly Sensationalizes the Issues.

The Petition relies on supermarket tabloid sensationalism to attract undeserved attention and the confusion caused by the ADA's many terms and definitions to create "conflicts"

where none exist. Like the supermarket tabloids, the Petition's "headlines" (*i.e.*, the questions presented) indeed attract attention, but the "story" inside fails to deliver.

In an attempt to manufacture a controversy justifying granting the Petition, the Petition sensationally distorts the Ninth Circuit's decision, most notably by hopefully asserting that a "question presented" is: "[w]hether the Americans with Disabilities Act ("ADA") requires an employer to provide 'reasonable accommodations' for an employee's alleged impotence".[4]

First, the Court of Appeals majority did not find that impotence was a "disability" or that there was a duty to accommodate a "disability" of impotence. To be covered by the ADA an employee must be a "qualified individual with a disability" who can perform the essential functions of their position with or without reasonable accommodation. 42 U.S.C. § 12111(8). To be "disabled" under the ADA, an individual must have a physical or mental impairment which "substantially limits a major life activity". 42 U.S.C. § 12102(2).

McAlindin's disability as analyzed by the District Court was the mental impairment of anxiety disorder. (App. 47.) The District Court found that the impairment did not substantially limit a major life activity and granted summary judgment. (App. 52.) The majority of the Court of Appeals disagreed, finding that McAlindin's anxiety disorders, panic disorders, and somatoform disorders were mental

4. All three "questions presented" rely on sensationalism and the confusion caused by the ADA's many terms and definitions to create absurd sounding "questions" which do not mention the mental impairments of anxiety disorder, panic disorder and somatoform disorder.

impairments (App. 9); that sleeping, engaging in sexual relations, and interacting with others are major life activities under the ADA (App. 12-15); and that McAlindin raised a triable issue regarding whether he was substantially limited in those major life activities. (App. 15-17.) The Court of Appeals *did not find* that impotence was a "disability" under the ADA. The majority only found, as strongly implied in this Court's opinion in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998) and other courts, that engaging in sexual relations was a "major life activity" under the ADA. (App. 12.)

To maintain analytical clarity, it is important to note that the ADA is not just an employment statute but also covers, for example, public accommodations. 42 U.S.C. § 12182(a). Nevertheless, both applications share the same statutory standard of disability as set forth in 42 U.S.C. § 12102(2), which requires that an impairment substantially limit one or more major life activities to be a disability under the statute. *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2201-2202 (1998) (holding asymptomatic HIV infection is a disability under the ADA; remanding to determine essentially if filling cavities in a dentist's office would pose "direct threat").

This Court must continue to be cautious, as the Ninth Circuit was, to understand the broader applications of the ADA. The Court must not get distracted, as the Petitioner is, by viewing the ADA's "major life activities" only through the employment prism. Such limited vision could have broad negative implications for public accommodations as well as disability discrimination disparate treatment claims.[5]

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5. Disparate treatment disability discrimination includes adverse employment such as "hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment". 42 U.S.C. § 12112(a).

B. The Ninth Circuit's Decision Agrees on the Same General Principles of Law as, and Does Not Conflict with, Fifth Circuit Precedent.

The Petition's attempt to create a conflict between the Ninth Circuit's decision in this case and two Fifth Circuit opinions, *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 163 (5th Cir. 1996) and *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 522 U.S. 1984 (1998), is fallaciously manufactured out of the confusion sometimes generated by the ADA's many terms and definitions. No real conflict exists.

Taylor is focused on an issue not raised in the case before this Court: whether the plaintiff actually "made a cognizable request for accommodation". *Taylor*, 93 F.3d at 162. The *Taylor* plaintiff told a supervisor he had "bipolar disorder" and asked for help but did not specifically state how the bipolar disorder was a "limitation." *Taylor*, 93 F.3d at 162-163. Relying in part of the pertinent statutory language[6], the Fifth Circuit upheld summary judgment concluding that the plaintiff "failed to adduce any summary judgment evidence showing that he told (his employer) that he was limited as a result of his disability." *Id.*, at 164. *Burch* simply cites *Taylor* and notes that to state a discrimination claim under a failure to accommodate disability theory the Plaintiff must "demonstrate that a substantially limiting impairment somehow affected his ability to perform his job." *Burch*, 119 F.3d at 314, n.4.

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6. 42 U.S.C. § 12112(a)(5)(A). ("[t]he term 'discriminate' includes . . . not making reasonable accommodation to the *known physical or mental limitations* of an otherwise qualified individual with a disability . . .") (emphasis added)).

In the case before this Court, the Ninth Circuit decision was not focused on a "cognizable request for accommodation" and the "known . . . limitations" language of 42 U.S.C. § 12112(a)(5)(A). Instead the Ninth Circuit is focused on the term "disability", which is defined in part as a "physical or mental impairment which substantially limits one or more major life activities." (App. 9-17 (*quoting* 42 U.S.C. § 12102(2)). Even so, the Ninth Circuit decision generally reaches the same result when it stated:

> The two inquiries — namely, whether McAlindin is disabled and what constitutes reasonable accommodation for that disability — only intersect to the extent that McAlindin's disability manifests itself in the workplace.

(App. 2, 20.)

The Petition itself characterizes *Taylor* and *Burch* as stating "there must be a work-related nexus between the alleged impairments and the proposed accommodations". (Pet. at 8.) That is what the Ninth Circuit did when it defined the "intersection" between the issue of McAlindin's disability and what constitutes reasonable accommodation for that disability. Therefore, despite the language nuances, the cases generally state the same correct legal principle and are not in conflict.

The remainder of the Petition's discussion about the alleged "conflict" with the Fifth Circuit's *Taylor* and *Burch* decisions, (Pet. at 9-11), addresses factual disputes about issues the Ninth Circuit's decision properly found presented genuine issues of material fact to be resolved at trial such as the extent of the impairments, (App. 15-17), and does not present conflicts on matters of law between the circuit courts of appeal justifying granting the Petition.

II.

THERE ARE NO CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON ISSUES OF "STRESS" TRANSFERS OR WHETHER AN EMPLOYEE CAN BE ACCOMMODATED IN HIS PRESENT POSITION WHICH WOULD JUSTIFY GRANTING THE PETITION.

While McAlindin was out for eighteen months on stress-related disability leave, he repeatedly requested through counsel, with written support from his psychiatrist, a transfer to a systems analyst position in another department because returning to his former position with its "negative associations" would exacerbate his condition and "impede his recovery". (App. 6.) The County indicated it would place McAlindin's name on an unranked transfer list which County's departments can use if they wish, but would do nothing else, even though the County did not dispute that systems analyst vacancies occur with "some frequency". *Id.*

Before McAlindin returned from the disability leave, the County required McAlindin to be examined by a psychiatrist it retained. The County retained psychiatrist confirmed the diagnosis of anxiety and panic disorder and confirmed that McAlindin should not immediately return to his former position. The County's psychiatrist also concluded, perhaps predictably enough, that with more medication and treatment McAlindin could return to his former job in three to six weeks. The County then told McAlindin that he had to obtain the treatment and return to his job within two months or he would not work for the County again. *Id.*

A. The Third Circuit Has Found Only That a Requested Transfer *to* a Position That Did Not Have "Prolonged and Inordinate Stress" Was Unreasonable, an Issue Not Addressed by the Ninth Circuit.

The Petition mischaracterizes and misapplies the Third Circuit's opinion in *Gaul v. Lucent Technologies*, 134 F.3d 576 (1998), to hopefully create a "conflict" with the Ninth Circuit's opinion (Pet. at 12); and implore this Court "to grant review on the important issue of whether employers bear a duty to transfer an employee whenever he or she is "stressed out" by coworkers". (Pet. at 14.) As will be seen, there is no conflict with the Ninth Circuit decision.

In *Gaul* the plaintiff was stressed by a co-worker and asked "that he be transferred to a lower-stress position". *Gaul*, 134 F.3d at 578. *Gaul*'s plaintiff *further* claimed that he could not "work for any employer, unless he is protected from prolonged and inordinate stress." *Id.* The Third Circuit held that the proposed accommodation of transfer *to* a position where he was protected from "prolonged and inordinate stress" was unreasonable as a matter of law.

In reaching its holding, the Third Circuit reasoned that the "prolonged and inordinate stress" standard was too "amorphous" in that stress levels "at any given moment" are too difficult a standard by which to gauge compliance for an accommodation; that extraordinary employer administrative burdens would be imposed to assign an employee to such a position; and that "by asking to be transferred away from individuals who cause him prolonged and inordinate stress, Gaul is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work." *Gaul*, 134 F.3d at 581.

Regardless of whether the Third Circuit's decision is correct, its opinion does not conflict with the Ninth Circuit's opinion. McAlindin only requested to be transferred to another systems analyst position. Unlike *Gaul*'s plaintiff, McAlindin did not place any limits on the position he requested other than it be another systems analyst position in another department than where he had worked. McAlindin did not make the request that the Third Circuit found unreasonable, *i.e.*, that he not be subjected to "prolonged and inordinate stress." Therefore there is no conflict with the Ninth Circuit's majority opinion.

The Ninth Circuit merely found that "[g]iven the lack of evidence [of undue hardship] offered by the County and the relatively unburdensome nature of the requested accommodation [transfer to another department]," a triable issue was created regarding whether the requested transfer was a reasonable accommodation. (App. 21.) Unlike the employer in *Gaul*, here the County presented no evidence of undue hardship, and the Ninth Circuit correctly decided the case presented to it.

Also, the Petition's attempt to elevate the Third Circuit's third reason that a transfer for *Gaul*'s plaintiff was unreasonable, (that "by asking to be transferred away from individuals who cause him prolonged and inordinate stress, Gaul is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work," *Gaul*, 134 F.3d at 581), into an "important issue" justifying review, (Pet. at 14), is unavailing for at least two reasons.

First, as noted above, there is no conflict with the Ninth Circuit because the Ninth Circuit did not address the request made by *Gaul*'s plaintiff regarding assignment *to* a position where there was "no prolonged or inordinate stress." Second, the cited language is *dicta* in the Third Circuit's opinion. The holding is that the transfer requested was unreasonable. The Third Circuit did not hold that *any* transfer away from persons causing the Plaintiff stress was unreasonable. It only reasoned that such a transfer was unreasonable in Gaul's situation where he was also requesting transfer *to* a position where there is "no prolonged or inordinate stress," a situation not presented to nor decided by the Ninth Circuit.

Thus there is no conflict between *Gaul* and the Ninth Circuit decision, and for this additional reason the Petition should be denied.

B. There Is No Conflict Between The Ninth Circuit's Decision And Other Circuits on When a Transfer or Reassignment Is a Reasonable Accommodation.

The Petition hopefully asserts that the Ninth Circuit's decision is "inconsistent with the decisions of numerous circuits, which *hold* that an employer is not obligated to accommodate an employee by transferring him to a *new* position unless he cannot be reasonably accommodated in his *present* position." (Pet. at 15.) (Emphasis added on first term, emphasis in original on latter two terms; citations omitted.)

This contention is erroneous because the other circuits did not hold there is in all situations a rigid rule-type methodology that there must first be a failed attempt to accommodate the employee in his current position before

the employer is obligated to transfer the employee to a new position. Rather the other circuits noted or mentioned in the course of discussing other issues language indicating that there is a *preference*, not a requirement, that employees first be accommodated in their current position. These cases mostly address a legal issue not addressed in the Ninth Circuit decision before this Court, *i.e.*, whether an employer has a duty to accommodate an employee who cannot perform *at all* in his or her current position with or without reasonable accommodation.

Petitioner urges that EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o) (1999), should be elevated to the status of a regulation when the Interpretive Guidance is itself only the EEOC's commentary on its own regulations. Of course, this Court has not even decided the question of whether the EEOC has the authority to issue these regulations in the first place,[7] let alone whether to give regulation-like effect to a comment on a regulation of unsettled validity. In any event, Petitioner's argument fails for a number of reasons.

First, the EEOC's actual regulation, 29 C.F.R. § 1630.2(o) (1999), provides, like the statute, a non-exclusive listing of possible accommodations stating that: "reasonable accommodation may include . . . reassignment to a vacant position." 42 U.S.C. § 12111(9)(B), 29 C.F.R. § 1630.2(o). Nothing in the statute or the regulation limits "reassignment" to situations when accommodation in an employee's current position has first demonstrably failed. Second, the EEOC's

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7. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 1245-1246 (1999); *Murphy v. United Parcel Service*, 119 S. Ct. 2133, 2138 (1999) (assumes EEOC regulations are valid).

Interpretive Guidance to its own regulation is not even written in a mandatory way but at most suggests a non-binding preference for implementing the "reassignment" accommodation. It states: "*In general*, reassignment *should* be considered only when accommodations within the individual's current position would pose an undue hardship." (emphasis added). "In general" does not mean "always," and "should" does not mean "shall," as the Petition hopefully suggests. As this Court has recognized, the term "should" is "hortatory, but not mandatory". *Olmstead v. L.C.*, 119 S. Ct. 2176, 2186-2187 (1999).

Whatever the EEOC's authority, it clearly did not take the statute's listing of "reassignment to a vacant position" as part of a non-exclusive list of accommodation options and limit its application through a rigid methodology such as the County desires.

Further, none of the cases cited by the Petition "hold that an employee is not obligated to accommodate an employee by transferring him to a *new* position unless he cannot reasonably be accommodated in his *present* position" as promised in the Petition. (Pet. at 15.) (Emphasis in original, citations omitted.)

Smith v. Midland Brake Inc., 180 F.3d 1154, 1170-1171 (10th Cir. 1999) held that a qualified individual with disability under the ADA (42 U.S.C. § 12111(8)) could include one such as *Smith*'s plaintiff who could not perform the essential functions of his current position *at all, even with accommodations*, but could perform in another position, i.e., a position that he "desires." The Tenth Circuit went on to find that "[r]eading § 12111(8) and (9) together, a reasonable accommodation may include a *re*-assignment

from the employee's current job to one that he or she desires." *Smith*, 180 F.3d at 1161. (Emphasis in original). The Tenth Circuit simply found that "[w]hen an employer selects among several possible reasonable accommodations the *preferred option* is always an accommodation that keeps the employee in his or her existing job if that can reasonably be accomplished" *Id.* at 1170. (Emphasis added, citations omitted). This is not inconsistent with the Ninth Circuit decision in the case before this Court. The Ninth Circuit did not hold or state anything in conflict with the "preferred option" language of *Smith*, it simply refused to affirm summary judgment utilizing the Petitioner's desired rigid methodology which "precludes transfer", particularly in the total absence of evidence from the County that such transfer would be an undue hardship. (App. 21-22.)[8] As the Ninth Circuit's decision correctly noted, since the statute permits transfers, the County's arguments that transfers are "precluded" would necessarily conflict with the clear language of the statute. (App. 22, n.10.)

The other cases cited by the Petition (Pet. at 15-16.) similarly do not hold anything in conflict with the Ninth

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8. The factual context of *Smith* was the same factual background expressed in the legislative history, i.e., a reassignment when the employee "can no longer perform the essential functions of the job that he or she has held. Efforts *should* be made, however, to accommodate an employee in the position that he or she was hire to fill before reassignment is considered". H.R. Rep. No. 485(II), 101 Cong., 2d Sess. at 63, *reprinted in* 1990 U.S.C.C. & A.N., 267 345. (*Quoted* in Pet. 16, n.6). Aside from the usual problems of resorting to legislative history, this piece of legislative history does not support the Petition's argument, at least because it used the term "should" which this Court has recognized as "hortatory, but not mandatory" *Olmstead v. L.C.*, 119 S. Ct. 2176, 2186-2187 (1999),

Circuit decision. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1300-1301 (D.C. Cir. 1998), relied on by the Tenth Circuit in *Smith*, concluded like *Smith* that employers have an obligation to reassign employees who cannot perform the essential functions of the position they are in, and did not hold that there was a rigid methodology requiring that in all cases that reassignment need only be considered if the employee cannot perform in the employee's current position. *Gile v. United Air Lines, Inc.*, 95 F.3d 492 (7th Cir. 1996) addressed the same issue as *Smith* and *Aka*, and stated only that the ADA requires reassignment of a disabled employee who can no longer perform the essential functions of the current position, and adds nothing to Petitioner's argument. *Gile*, 95 F.3d at 498-499.[9] In *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998), the Circuit Court held that the employee failed to propose a reasonable accommodation for her breathing disability and only briefly mentioned in *dicta* the same "preference" language similar to the EEOC's Interpretive Guidance. (*i.e.*, "(*(g)enerally*, transfer or reassignment of an employee is only considered when accommodation within the individual's current position would pose an undue hardship."). *Id.* at 634.

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9. The other Seventh Circuit case cited, *Vollmert v. Wisconsin Dept. of Transp.*, 197 F.3d 298 (7th Cir. 1999) in holding that a particular expert report was sufficient to raise a genuine issue of material fact and that a particular transfer and training was not a reasonable accommodation in that case, simply noted its *Gile* decision and characterized it as having "recognized that reassignment *generally* should be utilized as a method of accommodation only if a person could not fill the requirements of her current position with accommodation." *Id.* at 301-302. (Emphasis added, citations omitted).

In summary, the cases cited in the Petition do not conflict with the Ninth Circuit's decision. The cases cited reflect a preference that *generally* accommodation in the current position *should* be considered first, an issue not addressed in the Ninth Circuit's decision. The Ninth Circuit merely found that in the complete absence of evidence of undue burden by the County, it would not affirm summary judgment on the County's theory that a transfer was "precluded" by the EEOC's Interpretive Guidance. (App. 20-22.)

CONCLUSION

For all the foregoing reasons Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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